

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

WILLIAM LYNN FOLEY et al.,

Plaintiffs,

vs.

CIV 1:09-1147-RB-GBW

CARLSBAD MUNICIPAL SCHOOLS et al.,

Defendants.

PROPOSED FINDINGS AND RECOMMENDATION

This matter is before the Court *sua sponte*. On March 9, 2011, the Court ordered Plaintiffs to show cause why Defendant Patricio Lujan should not be dismissed due to Plaintiffs' failure to serve him within the prescribed 120 days. *See doc. 67*; FED. R. CIV. P. 4(m). Defendant Lujan was named in the original complaint, which was filed December 5, 2009. *Doc. 1*. Before serving anyone, Plaintiffs filed their Amended Complaint on February 22, 2010, where they again listed Patricio Lujan as a Defendant. *See doc. 2*. Even using this later filing date, the deadline for service under Rule 4(m) expired June 23, 2010.

Although a summons was issued as to Mr. Lujan on June 16, 2010, to date, Plaintiffs still have not served him. Moreover, they have not responded to the Court's Order to Show Cause why Defendant Lujan should not be dismissed without prejudice due to their failure to prosecute and failure to timely serve. This failure occurred despite the Court's warning that the "'failure of the plaintiff to prosecute or to comply with these rules or any

order of court” provides a basis for involuntary dismissal under FED. R. CIV. P. 41(b).” *Doc.* 67 at 2. In fact, Plaintiffs were warned that “[f]ailure to file a timely response [to the Order to Show Cause] will constitute a separate basis for dismissal. *Id.*

I THEREFORE RECOMMEND that Defendant Lujan be dismissed from this suit without prejudice.

THE PARTIES ARE FURTHER NOTIFIED THAT WITHIN 14 DAYS OF SERVICE of a copy of these Proposed Findings and Recommended Disposition they may file written objections with the Clerk of the District Court pursuant to 28 U.S.C. § 636(b)(1)(c). A party must file any objections with the Clerk of the District Court within the fourteen-day period if that party wants to have appellate review of the proposed findings and recommended disposition. If no objections are filed, no appellate review will be allowed.



UNITED STATES MAGISTRATE JUDGE